Supreme Court of the United States

OCTOBER TERM, 1940

No.

RICHARD SMITH, GERALDINE J. HALL,
Petitioners and Appellants Below,

against

THE UNITED STATES OF AMERICA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

There was no opinion rendered by the Trial Court relating to the petitioners. The opinion of the United States Court of Appeals for the District of Columbia (R. 137 to 141) rendered May 13, 1940, is still unreported.

II.

Jurisdiction.

A. The United States Court of Appeals for the District of Columbia made its order for mandate herein May 13, 1940. (R. 141)

B. The jurisdiction of this Court is invoked pursuant to provisions of Title 28, U. S. Code, Section 347, subdivision

"A", Section 240 (A) of the Judicial Code, as amended, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States.

C. The reasons stated in the preceding petition under II herewtih adopted and made a part of this brief, are believed to constitute good grounds for invoking the jurisdiction of this Court.

III.

Statement of the Case.

A statement of the case has been made in the preceding petition under I, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

A. 1. The United States Court of Appeals for the District of Columbia erred by refusing to follow the decisions of this Court in that it refused to decide that where the facts are uncontroverted that there is a violation of the Fourth Amendment, a defendant may raise an objection to the evidence without having first filed a Motion to Suppress.

2. The United States Court of Appeals for the District of Columbia erred by failing to decide that petitioners were afforded no opportunity to raise the matter prior to trial.

B. The United States Court of Appeals for the District of Columbia erred in deciding that upon challenge of the Government the Trial Court could excuse for favor jurors in excess of the ten peremptory challenges permitted by statute if the jury as finally constituted was fair and impartial.

C. The United States Court of Appeals for the District of Columbia erred in not deciding that it was reversible error to permit an attack on the character, reputation and

habits of a defendant prior to his putting the same in issue.

D. The United States Court of Appeals for the District of Columbia erred in misconstruing petitioners objection to the Trial Court's charge to the jury and in not deciding that the Trial Court charged the jury erroneously and prejudicially on the question of petitioners failure to testify.

V.

Summary of Argument.

A. 1. The United States Court of Appeals for the District of Columbia decided that where no motion to suppress was filed prior to the trial an objection to the evidence after the trial is in progress comes too late and cannot be considered even where the ground is that the evidence is uncontroverted that no probable cause for the issuance of the warrant existed and that there is an uncontroverted violation of the Fourth Amendment. This ruling is in direct opposition to the decisions of this Court. The evidence herein was uncontroverted that there were no facts showing probable cause. The warrant of arrest was illegally issued.

2. The past policy of the Trial Court was to permit an attack on the legality of the seizure of evidence by way of objection whether a motion to suppress had been filed or not. For the first time, when objection was raised herein, it held it was precluded from considering the validity of the seizure. Petitioners were thereupon afforded no opportunity to file a motion prior to trial.

B. The United States Court of Appeals affirmed the action of the Trial Court in summarily excusing for cause, upon the request of the Government, six jurors who had played the numbers within two years, upon the apparent presumption that they were prejudiced against the numbers law and would not render a fair and impartial verdict. The Court of Appeals further held that even if excused

for favor, which resulted in fourteen peremptory challenges for the Government, there was no harm done if the jury as impanelled was fair and impartial. The statute only allows the Government ten peremptory challenges. Prejudices and opinions relative to the crime itself do not form the basis for challenge for cause if the juror is otherwise able to render a fair and impartial verdict based on the evidence, which the Court made no effort to ascertain.

C. The character, reputation and habits of a defendant can only be put in issue by the defendant himself, and a statement by a Government witness on direct examination that the defendant had a reputation for fast driving was prejudicial.

D. The Court charged that the failure of petitioners to testify was because they were availing themselves of a Constitutional right not to do so. That is not the law. A defendant in a criminal case has the privilege of requesting to testify which is provided for in an Act of Congress which removed a disability from so doing. The Trial Court emphasized explanations of possession when there were no such issues in the case and commented on the failure of a member of a conspiracy to testify, all of which resulted in an unfair comment on the failure of petitioners to testify. All of which was affirmed by the Court of Appeals.

VI.

ARGUMENT.

A.

1. The United States Court of Appeals for the District of Columbia erred by refusing to follow the decisions of this Court, in that it refused to decide that where the facts are uncontroverted that there is a violation of the Fourth Amendment a defendant may raise an objection

to the evidence without having first filed a Motion to Suppress.

For facility of presentation, the Argument hereunder will be presented as follows:

(a) Rulings of the lower Courts and preliminary statement.

(b) An objection to the evidence may be raised at the trial without prior motion where the evidence is uncontroverted that there is a violation of the Fourth Amendment.

(c) The evidence was uncontroverted that there were no facts known to arresting officer or applicant for the warrant to show probable cause, and resulted in an uncontroverted violation of the Fourth Amendment.

(d) The warrant of arrest was illegally issued and invalid.

(a).

Rulings of the Lower Courts and Preliminary Statement.

The ruling of the Trial Court is specifically set forth first on page 102 of the record where upon a renewal of petitioners' motions the following appears:

> "The Court overruled all the motions made on behalf of the three defendants *stating it did not find it necessary to pass on the validity of the arrest warrants,* since the case of *James Bennett and Eula Mae Bennett* v. *United States,* decided February 27, 1939, (67 W. L. R. 734, 736) in the United States Court of Appeals for the District of Columbia precluded it from considering during the trial the legality of the seizure of the various exhibits." (No motion to suppress having been filed.)

And again on page 105 of the Record the Court stated:

> "I make my ruling on the Bennett case."

The Court of Appeals in its written opinion, paragraph two of page two holds:

> "Appellant Smith first insists that the warrant of arrest was improperly issued and that the lottery papers obtained from his person and automobile should, therefore, have been excluded as evidence illegally obtained. The objection was not made until the trial was well under way, and we have recently held that, unless there is no opportunity to make the motion in advance of trial, the objection comes too late after the trial is in progress. *Bennett* v. *United States,* 70 App. D. C. 76, 104 Fed. (2) 209. . . ."

It is therefore clear that the merits of petitioners' objection have never been considered, both lower Courts refusing to do the same; and both lower Courts refusing to even comment on petitioners' specification of error herein.

To all the testimony as to the arrest of appellant, the search and seizure, and the admission of the seized evidence, petitioners duly objected; and when the warrants of arrest were offered in evidence petitioners moved the Court to quash it on the following grounds:

1. The affidavits failed to show probable cause.

2. The uncontroverted testimony of the Government itself clearly showed there was no probable cause on personal knowledge. (R. 62)

It is therefore also clear that petitioners' contention was clearly set forth in the Trial Court and presented to the Court of Appeals where, it will not be denied, petitioners in briefs and arguments vigorously urged it upon the Court.

(b).

An Objection to the Evidence May Be Raised at the Trial Without Prior Motion Where the Evidence Is Uncontroverted That There Is a Violation of the Fourth Amendment.

Direct authority for this contention are two specific decisions of this Honorable Court, that is, *Agnello* v. *United*

States, 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, and *Gouled* v. *United States*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, wherein this Court spoke on the identical proposition.

In the Agnello case on page 34 of 269 U. S., this Court said.

> "The Government contends that even if the search and seizure were unlawful, the evidence was admissible because no application on behalf of defendant was made to the court for the return of the can of cocaine. The reason for such application, when required, is that the court will not apuse in a criminal case to determine collateral issues as to how the evidence was obtained. See *Adams* v. *New York*, 192 U. S. 585, 594, affirming 176 N. Y. 351. *But in this case, the facts disclosing that the search and seizure violated the Fourth Amendment were not in controversy.* That is shown by the examination of the witness called to give the evidence. There was no search warrant; and from the first, the position of the Government has been that none was necessary. In substance Frank Agnello testified that he never had possession of the can of cocaine and never saw it until it was produced in court. There is nothing to show that in advance of its offer in evidence, he knew that the Government claimed it had searched his house and found cocaine there, or that the prosecutor intended to introduce evidence of any search or seizure. It would be unreasonable to hold that he was bound to apply for the return of an article which he maintained he never had. *Here, by uncontroverted facts it appears that a search and seizure was made in violation of the Fourth Amendment. There is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained may not invoke protection of the Fifth Amendment immediately and without any application for return of the thing seized.* A rule of practice must not be allowed for any technical reason to prevail over a constitutional right. *Gouled* v. *United States*, 255 U. S. 298, 313." (Italics supplied.)

In the Gouled case on pages 312, 313 of 255 U. S., this Court said as follows:

> ". . . It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of evidence tendered has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it *becomes probable* that there has been an unconstitutional seizure of papers, *it is the duty* of the Trial Court to entertain an objection to their admission as a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a Constitutional right.
>
> "In the case we are considering, the certificate shows that a motion to return the papers seized under the search warrants, was made before the trial and was denied, and that on the trial of this case before another judge, this ruling was treated as conclusive, *although as we have seen in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized.* The Constitutional objection having been renewed, under the circumstances the Court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant." (Italics supplied.)

The two leading cases on the subject are *Adams* v. *New York,* 192 U. S. 505, 24 S. Ct. 372, 48 L. Ed. 575 and *Weeks* v. *United States,* 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652. These established the basic rule that a Court will not pause in a criminal case to determine collateral issues as to how the evidence was obtained.

This basic principle was again affirmed in *Segurola* v. *United States,* 275 U. S. 106, 48 S. Ct. 77, 72 L. Ed. 186, with an exception enunciated that the rule does not apply where there has been no opportunity to present the matter in advance of trial.

But there is nothing in the Segurola case to imply that the exception mentioned therein is the "only" one; nor is there anything in the Segurola case to imply that this Court departed from the principles laid down in the Agnello and Gouled cases. On the contrary the language therein is consistent with them.

Bennett v. *United States, supra,* was founded on the authority of the Segurola case. The Trial Court and Court of Appeals predicated their ruling in this case on the Bennett case.

Insofar as there was nothing in the Segurola case, and hence in the Bennett case, overruling the doctrines of *Agnello* v. *United States* and *Gouled* v. *United States,* it was error to hold that petitioners' objection to the evidence on the ground that there was an uncontroverted violation of the Fourth Amendment could not be considered.

(c.)

The Evidence Was Uncontroverted That There Were No Facts Known to the Arresting Officer or Applicant for the Warrant to Show Probable Cause, and Resulted in an Uncontroverted Violation of the Fourth Amendment.

The record is uncontroverted that the Deputy Marshal executing the warrant of arrest was possessed of no facts at all.

As the arrest was made pursuant to the direction of Officer Deyoe, let us next consider what he knew.

The record is also uncontroverted that he made the only affidavit in support of the warrant of arrest.

It is uncontroverted by Deyoe himself that the *only* fact

known to him of personal knowledge was that on December 27, 1938 he observed the co-defendant Hall at Town Tavern Inn in Maryland, hand a white package to a colored man who in turn gave that package and one of two others to appellant who arrived a short time later. Thereafter on January 6, 1939 he went to the office of United States Commissioner Turnage and swore to the arrest warrants. (R. 50-51)

The contents of these packages were not known to Deyoe.

It hardly needs argument that these facts, which were the only ones known to Deyoe do not constitute probable cause that appellant was promoting a lottery, selling lottery tickets and possessing lottery tickets in the District of Columbia.

Insofar as Officer Deyoe was concerned there was nothing illegal in Hall's delivery of a paper package to appellant through the medium of a colored man, he having no knowledge whatsoever as to the contents.

It is therefore obvious and not in controversy that there were no facts known to Deyoe to constitute probable cause, and therefore no controversy that there was a violation of the Fourth Amendment. (*Agnello* v. *United States, supra.*)

The Court, therefore, should have refused to admit in evidence the fruits of the execution of the illegal warrant.

It will be argued by the Government that at the time of the arrest, Deyoe had probable cause to arrest.

Facing this issue squarely the only additional facts known to Deyoe between the time he procured the warrant and the time of its execution was an identical situation: the delivery of a package, contents unknown, from Hall to appellant through the medium of an unidentified white man.

This, of course, adds nothing. The only other possible evidence was what he could have learned from his fellow officers—and there is no such testimony in the Record.

In *Bolt* v. *United States,* 2 Fed. (2) 922, 55 App. D. C.

120, this Court had occasion to pass on a similar situation and said in part:

> "The Court erred in permitting the two police officers to testify as to what was said to them by an unidentified informant, out of the presence of plaintiff in error. This was hearsay evidence and highly prejudicial.
>
> "Where, as here, a citizen has conducted himself in a peaceable and orderly manner, it is not for police officers to assume guilt, and without a warrant make an arrest and search, and seize a weapon. Since the statement of the unidentified man was inadmissible, as already found, it could not have justified the arrest, and no other circumstance even tended to afford such justification."

It is also uncontroverted that the only numbers plays made by Rattley were with the police officer Best; and that Rattley's transaction with Hall were entirely disjointed from the writing of the numbers; and that there was nothing unusual or significant about the package transferred except the personal belief and presumption of the officer that if Rattley were writing numbers for him then he must be writing them for others, the presumption that he placed them in a paper bag, the presumption that he delivered them to someone else and the presumption that Hall is that person.

Any possible information that Deyoe could have had would be hearsay and presumptuous beliefs of Officer Best.

The only manner in which the Court of Appeals establishes a relationship between petitioners and Rattley's number writing is by the seized evidence itself, which petitioners claim should have been excluded.

It will be further seen in subdivision "d" immediately hereafter that such information does not constitute probable cause.

With reference to a delivery of packages, in the case of *Gart* v. *United States*, 294 Fed. 66 (C. C. A. 8th) the de-

fendant was charged with a sale of narcotic drugs. The evidence tended to show a delivery of the package on the street. The Trial Court admitted evidence that at another time and place the defendant delivered a package on the street to another person, the contents of this package not being shown. On appeal, it was held to be error. This question presented the sole ground of appeal, and the Court presented an excellent review of the authorities.

The evidence was clear and uncontroverted that the officer was possessed of no facts showing probable cause and that the arrest of the appellant was clearly in violation of the Fourth Amendment.

(d).

The Warrant of Arrest Was Illegally Issued and Invalid.

The Government did not deny this in the Court of Appeals.

There was not a single statement of fact therein contained to show probable cause.

The Court of Appeals passed upon the sufficiency of such affidavits in *Schencks* v. *United States,* 2 Fed. (2) 185, 55 App. D. C. 84, wherein it stated in part:

> "If the peace officer has reason to believe and does believe that a search or seizure ought to be made, he should state in his affidavit the facts which led him to that conclusion, and which were known to him of his own knowledge. If he has no first-hand information as to material facts, but has been informed by another as to facts or conditions which would justify the issuance of process for search or seizure, the officer should secure the informer's affidavit positively alleging of the latter's own knowledge the existence of such facts and conditions."
>
> "*The Constitution is paramount, and the courts will not permit the evasion of the Constitution by validating writs issued on sworn declarations which literally comply with the terms of the statute, but which fail to establish probable cause, inasmuch as they state the*

facts on information and belief or state conclusions of fact or of law instead of positively alleging the material facts.'' (*Citations.*) (*Italics supplied.*)

"We must hold therefore, that affidavits or depositions . . . which go no further than to allege conclusions of law or of fact . . . are insufficient to support a search warrant, and any search warrant issued on such affidavits or depositions is invalid. (Citations.)

"as the search warrant was illegally issued, the articles and things seized thereunder were taken in violation of defendant's Constitutional rights, and the admission of them over objection as evidence against her was error."

In *United States* v. *Gokey,* 32 Fed. (2) 793 (D. C., N. Y.), it was held that under the Fourth Amendment:

". . . the commission of a crime must be shown by facts positively stated before a commissioner has jurisdiction to issue a warrant of arrest. . . . The 'oath or affirmation' required is of facts, not opinions or conclusions. . . . A Complaint not based upon the complainant's personal knowledge and unsupported by other proof, confers no jurisdiction upon the Commissioner to issue a warrant.

"In this case there is not any claim that the immigration officer, who made the complaint, had any personal knowledge of the commission of the crime charged, or any other crime. . . . This lack of personal knowledge was admitted at the hearing. The Complaint therefore becomes nothing more than a statement of the commission of a crime, based upon heresay. Although made upon the positive oath of complainant, it is in reality a complaint based upon information and belief and no more. The positive averments of an official as to facts not within his personal knowledge may be enough to protect a Commissioner, but they should not be sufficient to confer jurisdiction, in violataion of the Constitution and the numerous decisions of the Courts. The complaint must, therefore, be held insufficient."

It is therefore respectfully submitted that the affidavit herein stated no facts whatsoever to show probable cause, only literally complied with the terms of the statute by setting forth conclusions of law, not based upon personal knowledge, and, therefore, the warrant was illegally issued.

2. *The past policy of the Court was to permit an attack on the warrant without the filing of a motion to suppress.* (R. 102)

In *Bennett, et. al.* v. *United States, supra,* the Court of Appeals held that where it was the established practice of the Trial Court not to hear Motions to Suppress prior to trial a failure to file such motion did not preclude the defendant from raising the issue at the trial where no such motion was filed.

Such holding by that Court is unquestionably sound.

The Trial Court herein frankly stated that prior to the Bennett case its custom was to permit counsel to either file a motion to suppress or object to the evidence as they in their discretion may determine. (R. 102)

It is therefore respectfully submitted that the Court erred in changing its policy at a time when the appellant could do nothing about it.

In the Bennett case the Trial Court refused to grant an opportunity before trial expressly; in the instant case the Trial Court changed its custom at the trial, and thereupon provided no opportunity to raise the issue in advance of trial.

Upon this question of law of procedure, there is a varied practice among the Trial Justices in the District Court. Appellant therefore respectfully states that the same rule on the exception should be applied to him as in the Bennett case.

It is therefore respectfully submitted that the Court should have passed upon the invalidity of the arrest, the invalidity of the search and seizure and should have sustained appellant's objection to the admission in evidence of the things so seized.

B.

The United States Court of Appeals for the District of Columbia erred in deciding that a trial court may at the request of the Government allow more peremptory challenges than permitted by statute on the theory that a defendant is not prejudiced if the jury as finally constituted is fair and impartial; further error being the release of six jurors for cause.

The statute involved is found in Title 6, Section 366 D. C. Code (1929) and allows each side ten peremptory challenges.

At the request of the Government (R. 25) the Court inquired "Has any member of the panel as now seated in the box played the so-called numbers game within two years of this date?" Six jurors who answered in the affirmative were summarily excused for cause.

The Court made no effort whatsoever to determine whether or not these jurors could render a fair and impartial verdict based solely on the evidence.

The Court of Appeals affirming this act held:

> "—Appellants do not complain of the fairness of the jury as impanelled, and all that they are entitled to is a trial by an impartial jury. Moreover we think it was well within the judicial discretion of the judge to excuse prospective jurors on the ground stated, and it makes no difference whether the release was for cause or favor."

It is respectfully urged that the Court of Appeals erred in making a basic principle all embracive.

This Honorable Court in pertinent language has held that where negroes were excluded from a panel trying a colored man there was a violation of his legal rights without regard to the jury as constituted. (*Norris* v. *Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 and *Strauder* v. *West Virginia*, 100 U. S. 303).

The Government exercised eight additional peremptory challenges, which when added to the six, totalled fourteen and was in excess of that allowed by the statute.

The only reason such jurors were excused was because of a presumed prejudice or opinion relative to the "numbers" law.

This doctrine has been specifically rejected by the Courts. Petitioners respectfully present several such adjudications.

> "Parties have a right to be tried by an impartial jury. This does not mean that they have a right to have jurors who have no prejudices or no opinions as to the policy of enforcing the laws."

United States v. *Noelke*, 1 Fed. 426, 434 (C. C. S. D. N. Y.)

This case was followed in *United States* v. *Borger*, 7 Fed. 193 (C. C. S. D. N. Y.) where a defendant was charged with operating a lottery. A juror asserted his prejudice against the business to such extent that he would give the defendant's testimony less weight than a prosecuting witness' testimony if a question of veracity should arise. But otherwise he felt he could render a fair verdict on the evidence. From a denial of a challenge for cause, the defendant appealed. It was affirmed on the ground that such prejudice was one against the crime and as such does not affect the sufficiency of a juror.

In *Ungerleider* v. *United States*, 5 Fed. (2) 604 (C. C. A. 4th) the Court held that persons contributing to Anti-Saloon League were not disqualified as jurors in a prosecution for conspiring to violate the National Prohibition Act; where each of them stated that he could and would give as fair consideration to such a case as to one charged with breach of any other statute. (Italics supplied.)

In *Beatty* v. *United States*, 27 Fed. (2) 323 (C. C. A. 6th) the Court said:

> "A question may be asked if any of the jury were members of organizations engaged in suppression of

> the particular crime for which the defendant is charged; but such membership, if it does not apply to the instant case, is no ground for challenge for cause but only to serve the defendant as a basis for the exercise of his peremptory challenges." Citing *Remus* v. *United States,* 291 Fed. 501.

To the same effect is *Corley* v. *State,* 162 Ark. 178, 257 S. W. 751, Arkansas.

The point was succinctly stated by the Court in *Page* v. *State,* 115 Tex. Cr. R. 605, 27 S. W. (2) 219 wherein it said:

> "It (a written statement) is sufficient to show a bias of the juror in favor of the prohibition law and a prejudice against liquor law violators. This is not sufficient to disqualify the juror, where the juror, as in this case, answered that he had no prejudice against the defendant, nor against people charged with violation of the liquor law, nor any opinion that would affect his verdict."

In *State* v. *Swain,* 180 La. 20, 156 So. 162 the Court said:

> "Juror is considered 'impartial' when he is neither biased in favor nor prejudiced against accused, when he has not formed or expressed an opinion as to the guilt or innocence of accused, and when he entertains no conscientious scruples which would prevent his carrying the law into effect."

And as to the presumptions applied to jurors, in *State* v. *Dean,* 274 N. W. 817, 65 S. Dak. 433 the Court stated:

> "The fact that these jurors stated, upon examination by counsel for appellant, that they had a personal prejudice against the use of a gun in defense against a physical assault by one unarmed would not refute the presumption of their honesty in stating that they would consider the facts of the case impartially according to the instructions on the law as given by the Court."

Again in *Elkins* v. *State*, 233 Pac. 491, (Okla.), Feb. 14, 1925, the Court stated:

> "A mere partial opinion or impression does not disqualify him if it be apparent that such partial opinion or impression will not influence the juror in finding a verdict.
> "On juror's voire dire examination, Court should resolve all doubts as to competency of juror in favor of accused."

In *Garvey* v. *Michaud*, 184 At. 712 (Vermont), (May 5, 1936), the Court held:

> "The competency of a juror will be presumed until the contrary is shown; and the burden is upon the challenging party to establish the disqualification of the juror."

In further support of the foregoing propositions of law appellant submits the following:

Kelly v. *City Council of City of Evanston*, 1 A. (2d) 185 R. I. (August 5, 1938).
Shaddix v. *State*, 90 Tex. Cr. R. 431, 235 S. W. 602.
Moore v. *City of Wichita*, 189 P. 372, 106 Kans. 636.

Appellant respectfully submits that the Trial Court erred in summarily excusing for cause upon Government challenge the said six jurors upon the possible presumption as to that prejudices or opinions relative to the crime itself without any effort whatsoever to determine their partiality or lack thereof.

This contention, as a principle of law, is set forth in *Searle* v. *Roman Catholic Bishop*, 203 Mass. 493, 89 N. E. 809, wherein it was held that a ruling by which all persons of a certain religious faith are excluded from the panel at the plaintiff's request renders his right of peremptory challenge relatively more valuable, and the defendant's similar

right relatively less valuable for the defendant is prejudiced by such an error, since no error which effects a party's right of peremptory challenge can be considered harmless.

It is therefore respectfully submitted that the United States Court of Appeals erred in not giving proper effect to both the statute and the law when it summarily excused at the request of the Government the six jurors for cause.

C.

The United States Court of Appeals for the District of Columbia erred in not deciding that it was reversible error to permit an attack on the character, reputation and habits of a defendant prior to his putting the same in issue.

The Government attempted to explain the presence of an Alcohol Tax Unit Inspector and asked the witness why he was there. The witness responded it was because they were using a car assigned to him. And then stated further the police needed a fast car because they knew, by reputation, that the defendant was a fast driver. (R. 88)

It is a fundamental principle of law that unless the accused has introduced evidence of good character, the prosecution cannot introduce evidence of his bad character and habits as part of its case. (*Gordon* v. *United States,* 254 Fed. 53.)

In a prosecution for murder, evidence of the Government that defendant's reputation for peace and quiet and for taking liquor was bad was prejudicial and reversible. (*Shorter* v. *Commonwealth,* 252 Ky. 472.)

In *Fish* v. *United States,* 215 Fed. 544, 551 (C. C. A. 1st), it was held that evidence of the defendant's propensity to commit crime was inadmissible.

In *Hazleton* v. *United States,* 293 Fed. 384 (C. C. A. 9th), there was a liquor prosecution. The Court admitted evidence by the police officer that he had arrested the de-

fendant, charged here with disorderly conduct for which she was convicted.

On appeal this was held to be prejudicial, the Court stating:

> ". . . but it was very prejudicial to allow the prosecution, as part of its case in chief, to introduce evidence of a plea of guilty of an apparently collateral offense. The evidence was not admissible as affording a legal inference of guilt of the crime for which defendant was being tried, and clearly its effect must have been to impress the minds of the jurors with the belief *that the defendant was a woman of bad tendencies and unworthy.* (Italics supplied.)
>
> "For the reason, therefore, that the reception of the evidence conflicted with the firmly rooted rule that the prosecution may not initially assail defendant's character, the judgment must be reversed. . . ."

To like effect is *State* v. *Levitt,* 278 Mo. 372, 213 S. W. 1008.

Appellant respectfully submits that the question of fast driving of an automobile was no issue in this case. The evidence reveals that defendant had stopped at a stop sign when arrested.

The implications of such statement are prejudicial. The Court made no effort to explain it to the jury but merely overruled appellant's motion.

Fast driving would imply reckless driving. Reckless driving is a crime and its severity stressed by this Court in *Colts* v. *District of Columbia,* 282 U. S. 63, 51 S. Ct. 52, 75 L. Ed. 177, which was an appeal from the United States Court of Appeals for the District of Columbia. (38 Fed. (2) 535, 59 App. D. C. 224.)

It put in issue appellant's reputation and habits. It tended to import a propensity to violate the speed and reckless driving laws. It tended to show he was a man of bad tendencies. (*Hazleton* v. *United States, supra*).

This, the courts have stated, cannot be done.

It is respectfully submitted that the Court erred in admitting evidence assailing the reputation and character of the accused.

D.

The United States Court of Appeals for the District of Columbia erred in misconstruing petitioners' objection to the trial court's charge to the jury and in not deciding that the trial court charged the jury erroneously and prejudicially on the question of petitioners' failure to testify.

1. The Court instructed the jury as follows:

> "Now, the defendants have not testified in this case. That is entirely their right under the Constitution. A person may testify or not, as he pleases, in a criminal case. If he does not testify, you must not draw any presumption or unfavorable inference against him or her because he has merely availed himself of his Constitutional right." (R. 117)

That is not the law.

This Court in *Bruno* v. *United States*, decided December 4, 1939, reported in Volume 60, No. 3, advance sheets of the S. Ct. Reporter at page 198, 200 recited the law to be as follows:

> "That Act (28 U. S. C. A. Sec. 632) freed the accused in a federal prosecution from his common law disability as a witness. But Congress coupled his privilege to be a witness with the right to have a failure to exercise the privilege not tell against him."

The Court conveyed to the minds of the jury that in refusing to testify, appellant was hiding behind a Constitutional right. That was not true.

It was presented to the jury in an incorrect and prejudicial manner and was therefore erroneous.

2. The evidence of the Government was offered to prove that appellant was in possession of certain writings which were used in the numbers game. There was no issue cre-

ated as to the possession of these writings nor any issue or evidence tending to explain the possession thereof.

Appellant did not take the stand.

Nevertheless the Court on three occasions instructed as follows:

> (R. 123.) ". . . Of course, if you believe that a satisfactory explanation has been made showing innocent possession of these records, or writings, then that would overcome the *prima facie* case made by the possession. It is not necessary that the explanation be contained in evidence offered by the defendants themselves; it is enough if it appears in the evidence which is offered in the case, on behalf of anybody."
>
> (R. 124.) ". . ., that is to say, the jury may presume from such possession if unexplained or unsatisfactorily explained that the possessor was concerned. . . ."
>
> (R. 124.) "As I say, that is only *prima facie* evidence, and if it is satisfactorily explained, then it would not be *prima facie* evidence."

And again on page 131 of the Record the Court stated:

> "It is a matter of common experience that if two or more people agree to violate the law, usually they do not reduce that agreement to writing; so ordinarily you do not have some member of the conspiracy called to the stand to tell you about it."

It is respectfully urged that the foregoing instructions were not based upon the evidence, unnecessarily and erroneously reflected upon the failure of appellant to testify, and in addition to its instruction on the subject, prejudiced the rights of appellant.

3. Nowhere is the issue raised that petitioners' counsel contended that the Trial Court erred in charging the jury without their request that the jury should draw no unfavorable inferences from petitioners failure to testify.

Conclusion.

It is respectfully submitted that the questions raised in this case are of sufficient importance to require this Court to issue a writ of certiorari to the United States Courts of Appeals for the District of Columbia to review its decision made herein.

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